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In the Supreme Court

of the United States

OCTOBER TERM, 1974

No. 74-1651

RICHARD A. CLARK, JAMES H. EVANS, WESTON M. LENNOX, DAVID A. MOFFAT, SAMUEL L. SAVIDGE, GEORGE L. ZIMMERMAN and HELEN D. BLOOMFIELD,
Petitioners,

v.

H. R. WATCHIE and SHEILA WATCHIE, his wife, H. R. WATCHIE & ASSOCIATES, INC., a Washington corporation, E. JOSEPH McCAMBRIDGE and JANE DOE McCAMBRIDGE, his wife, GENE LYNN and JANE DOE LYNN, his wife,
Respondents.

PETITIONERS' REPLY BRIEF

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ERRORS IN PETITION FOR CERTIORARI

Petitioners' attorney apologizes for error in the quotation from the opinion of the court of appeals which appears in the petition for certiorari. It should have read:

> "Appellants must show, as a condition to class status, that any misrepresentations or non-dis-

closures were common to the class. *They have not done so for* they have not shown that the alleged misrepresentations and non-disclosures involved every limited partner."

The quotation appears in the petition as a new paragraph and the words set out above in italics were omitted. The latter error apparently occurred because the first three words of the missing phrase are the same as those which follow it.

Petitioners' attorney has no excuse for his failure to find and correct those mistakes. The quotation was correctly set out in the copy sent to the printer, but the errors appeared in the proofs submitted by the printer. They should have been found and corrected by the author. Fortunately the mistakes do not appear to change the holding of the Court of Appeals.

NO BRIEF OF RESPONDENTS OTHER THAN LYNN

Respondents Lynn have filed a brief in opposition to the petition for writ of certiorari. Petitioners are advised that no other respondent will file a brief.

ARGUMENT IN REPLY TO LYNN BRIEF

The Lynn brief hints, but does not directly assert, that some of the class members were aware of the facts about the alleged scheme to defraud. Lynn cannot say that. The investors could not have known of an artificial market in real estate, of a real estate bubble about to burst, or of a scheme to sell the properties of earlier investors to the new syndicate at excessive prices if Lynn is correct in contending that those things never existed.

Faced with this dilemma Lynn came as close as he could to alleging individual knowledge of those things by some of the investors. At page 3, the Lynn brief asserts that "petitioner Evans was thoroughly knowledgeable about Watchie's operations."

The fact is that Evans was employed as a salesman selling residential lots in a Watchie subdivision. He demonstrated his ignorance of the facts about the venture by investing $80,000 in it and by recommending it to his friends. No one would have invested in the partnership if the artificial market, the real estate bubble and the scheme to defraud did in fact exist, and were known to the investors when they were asked to purchase partnership units.

Lynn's brief states (p. 2) "Some of the investors had purchased units in other similar ventures organized by H. R. Watchie." There was no other similar venture.

At page 4 respondent Lynn asserts that in denying a motion for summary judgment "the court determined that a trial would be necessary to establish exactly when each purchaser had sufficient knowledge of the allegedly undisclosed facts to start the running of the statute of limitations." The pertinent determination was made by the special master. He found that the statute of limitations against respondent

Lynn did not begin to run until his participation in the alleged scheme to defraud was brought to light by extensive discovery proceedings in this action (A-34). That finding was adopted in full by the district court.

In an extensive footnote at page 7 of the Lynn brief, there is an assertion that the pretrial order makes no claim of any false statements in the printed partnership articles. The pretrial order asserted (A-65) that there was a false representation that no property would be purchased by the partnership if Watchie or his related persons or interests owned an interest of 10% or more, unless the price paid was justified by two out of three separate MAI appraisals of each property. That allegedly false representation was made in those printed articles, which were used as the prospectus and distributed to all prospective purchasers of units.

The Lynn brief, and the decision of the court of appeals, assume that there should be no securities fraud class action unless the plaintiffs can establish that any misrepresentations and concealments were identical for each purchaser (A-16, Lynn Br. 9). That is not a proper application of the class action rule to many suits for alleged securities fraud. Where, as here, there is a single scheme to defraud, with a common core of fraudulent conduct, and the questions of law and fact that are common to all members of the class clearly predominate over questions effecting only individual members, a class action should be permitted. It is an abuse of discretion for a trial court to

deny class status to an appropriate action where common issues predominate, even if the suit is under S.E.C. Rule 10b-5 and the representations made to some investors were not identical to those made to others.

Lynn's position, at page 9 of his brief, that plaintiffs must "show that all the limited partners were victims of the same alleged misrepresentations or nondisclosures" is not reasonable. Common issues must predominate if class actions are to accomplish their intended purpose. It does not follow that those who sell securities by fraud should be permitted to insulate themselves against the only ordinarily effective private civil remedy by using some varying representations in carrying out their schemes to defraud. The trial court's consideration should not be limited to the presence or absence of identical representations to all investors. The court should instead find if common or individual questions of law or fact predominate when all aspects of the pending action are considered.

CONCLUSION

The Lynn brief demonstrates no good reason for denial of the petition for a writ of certiorari.

Respectfully submitted,

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